EXECUTIVE FUNCTION EXCLUSION – NEGOTIATION OF CONTRACT TERMS, HELD OUTSIDE THE EXCLUSION – EFFECT OF ANNEXATION AGREEMENT ON PROPOSED ZONING ORDINANCE, HELD OUTSIDE THE EXCLUSION – NOTICE REQUIREMENTS – TIMING – NOTICE GIVEN SOON AFTER SCHEDULING OF MEETING FOR NEXT DAY, HELD TO BE PERMITTED

April 15, 2005

Mr. Dennis Corkell

The Open Meetings Compliance Board has considered your complaint that the Commissioners of Sudlersville violated the Open Meetings Act by failing to give adequate notice in connection with a meeting held on February 15, 2005. For the reasons explained below, we conclude that the Commissioners did not violate the notice requirements of the Act.

I

Complaint and Response

The complaint noted that the Commissioners of the Town of Sudlersville met at 5:00 p.m. on February 15, 2005 at the Town Hall. According to the complaint, one commissioner stated that the purpose of the meeting was "to discuss town business with developers and their attorneys." The complaint characterized the meeting as "un-advertised" and pointed out that no mention was made of the February 15 meeting at the regular monthly meeting of the Town Commissioners held one week earlier, on February 8.

In a timely response on behalf of the Town Commissioners, the Town Attorney, Charles D. MacLeod, Esquire, explained the circumstances concerning the February 15 meeting and denied that a violation of the Open Meetings Act occurred. According to the response, the Town Commissioners for some time had been attempting to meet and interview engineering firms to select a firm for Town work. As of their February 8 meeting, the Commissioners had not yet received responses sufficient to schedule interviews. Responses were received from the firms on February 14, and interviews were scheduled for the following day. At the same time, a decision was made to schedule the closed meeting referred to in the compliant,

because the Commissioners would already be assembled. The Commissioners noted that this "was not a closed session of the body acting in a legislative capacity, but, in fact, was a meeting to perform an executive function; *viz*, to negotiate the terms of certain contracts." Giving notice at the February 8 meeting was termed "a practical impossibility."

The Town's official office hours are Tuesday through Thursday, 8:00 a.m. to 4:30 p.m. On Tuesday morning, February 15, notice was posted in the customary location, advertising the meeting that evening. According to the response, "[t]his was the earliest time at which such a notice could have been posted ..." The Commissioners' position is that, under the circumstances, they met the Act's requirement for "reasonable advance notice." § 10-506(a).[1] The Commissioners' response included a copy of the notice and draft copies of the minutes for both meetings on February 15.[2]

II

Analysis

A. Applicability of the Act

We must first examine the Commissioners' contention that the February 15 closed session was an executive function.[3] If so, none of the Act's provisions, including those regarding public notice, would have applied.

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[1] All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

[2] When the Compliance Board forwarded the complaint to the Town Commissioners for a response, the Compliance Board requested that it be provided with a copy of the notice of the February 15 meeting, any written statement prepared pursuant to §10-508(a)(2) in connection with the closed session, and minutes of the sessions held that date.

[3] Because the Commissioners mentioned the executive function exclusion in their response but did not explain the basis for their assertion, our co-counsel offered the Commissioners an opportunity to supplement its response. The Commissioners, through the Town Attorney, objected vehemently to our going beyond the original complaint and defended the adequacy of their initial response. This harsh reaction is puzzling, given that the Commissioners themselves introduced the executive function question and ought not to take offense at being asked to justify the assertion. Moreover, when the record permits us to do so, we believe it is appropriate to address issues of concern under the Act that were not specified in the complaint. Because Compliance Board opinions are strictly advisory, their value is primarily to assist the public body, as well as other entities subject to the Act, to ensure future compliance with the Act's provisions.

The executive function exclusion renders the Act inapplicable to a public body's discussion of matters that are not within any of the other defined functions set forth in the Act *and* that concern the administration of existing law or policy. 3 *Official Opinions of the Open Meetings Compliance Board* 26, 28 (2000) (Opinion 00-7).[4] The closed session at issue included the Commissioners, the Town Manager, Town Attorney, two developers, and their counsel. To the extent that the discussion concerned various utility-related obligations governed by annexation agreements that had already been approved and executed, it involved an executive function to which the Open Meetings Act did not apply.

There is some indication, however, that aspects of the discussion might have exceeded the scope of the executive function exclusion. The Commissioners' response noted in passing that the purpose of the meeting was to "negotiate the terms of certain contracts." If that is in fact what occurred, this discussion could not have been considered an executive function, because the topic would have constituted the initial steps of approving a contract – by definition, a "quasi-legislative function" under the Act. §10-502(j)(3). Another topic of discussion that, if it occurred, would have gone beyond the executive function is the potential effect on the annexation agreements of a proposed zoning ordinance. Discussion of pending legislation during the course of a meeting is a "legislative function" under the Act. §10-502(f)(1).[5]

Although we lack sufficient information to conclude firmly that portions of the February 15 closed session were beyond the executive function and therefore subject to the Act, we likewise do not have a sufficient basis on which to accept the Commissioners' assertion that the closed session was entirely an executive function. Under the circumstances, we shall assume that the Act applied to the February 15 closed session.[6] We next consider whether the Act's notice requirements were satisfied.

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[4] For brevity's sake, hereafter we shall cite our opinion volumes as *OMCB Opinions*.

[5] Even a preliminary discussion by a public body concerning potential legislation is a legislative function under the Act, because "consideration or transaction of public business" embraces "every step of the [decision-making] process." *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980); *see also* 3 *OMCB Opinions* 30, 34 (2000) (Opinion 00-8).

[6] Because the complaint focused entirely on an alleged failure to giver proper notice, and because we lack sufficiently detailed information to assess the Commissioners' compliance with other requirements of the Act, including the procedures used to close a meeting, we express no opinion on other compliance issues.

B. Timing of Notice

The Town Commissioners are correct in their assertion that the Act does not require a public body to announce at a meeting its future meeting plans. Rather, the Act simply requires that "a public body ... give reasonable advance notice" of a meeting that is subject to the Act, regardless of whether the meeting is open or closed. §10-506(a). Our focus is on whether the posting of notice at some point during the morning February 15, in advance of a meeting scheduled for 5:00 p.m. that day, was "reasonable." We recognize that February 15 was the first business day that the Town Office was open following the scheduling of the meeting.

The Act's "reasonable notice" requirement was obviously intended to give public bodies flexibility to schedule meetings on short notice when deemed necessary and does not lend itself to a bright-line method of determining whether notice was, in fact, reasonable. Advance notice is "reasonable" if it is given soon after a public body itself has scheduled the meeting. 3 *OMCB Opinions* 58, 59 (2000) (Opinion 00-13); Office of the Attorney General, *Open Meetings Act Manual* 19 (5th ed. 2004).

Apparently, the February 15 meeting was not scheduled until some point on Monday, February 14, when additional information requested from the competing engineering firms was in hand. The Town's office is not open on Mondays, but notice was posted the next morning, in advance of that evening's meeting.

Under the circumstances, we find that no violation occurred. Although one could reasonably contend that the scheduling of a meeting to discuss anticipated proposals need not await their actual arrival, that is not how the Commissioners went about it. We cannot find a violation merely because we can theorize about a possibility that in fact did not occur. Absent evidence of a public body's deliberately scheduling a meeting in a manner that negates the public's right to notice, we do not find a violation of the Act. *See, e.g.,* 1 *OMCB Opinions* 186, 189 (1996) (Opinion 96-11). In this case, the evidence is that the quick scheduling of the closed meeting was for the convenience of the Commissioners, a legitimate objective given the competing demands on their time. Once the meeting was scheduled, notice to the public was prompt enough.

III

Conclusion

With respect to the Commissioners' February 15 meetings, we find no violation of the public notice provisions of the Open Meetings Act. We express no opinion on other compliance issues related to the closed meeting on that date.

OPEN MEETINGS COMPLIANCE BOARD

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